SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

RALPH BERGER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

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I. The Question Of Petitioner's "Standing" To Challenge The First Of The Two Eavesdrops, i.e., The Eavesdrop In The Office Of Attorney Harry Neyer.

Respondent's challenge to Petitioner's "standing" (Br. in Opp. 27-29) is a limited challenge, and it is important to define exactly how this limited challenge affects the eavesdrop issues as a whole. Respondent does not challenge Petitioner's right to raise the issue of the basic constitutionality of New York's permissive eavesdrop legislation (N. Y. Code Crim. Proc. § 813-a). Nor does Respondent challenge our right to raise the issue of the Fourth Amendment (probable cause) sufficiency of the eavesdrop order which resulted in eavesdropping at the office of Harry Steinman, this being the eavesdrop actually

used in evidence against Petitioner at his trial (Pet. Cert. 5-8, 20-22). Respondent's challenge in point of "standing" is confined to the question of Petitioner's standing to attack the sufficiency of the eavesdrop order which resulted in eavesdropping at the office of attorney Harry Neyer, this having been the earlier in time of the two eavesdrops here involved (Pet. Cert. 5-8, 20-24).

Respondent's contentions on this question of "standing" (Br. in Opp. 27-29) are not only limited as above described, but even as to the narrow sector or the case to which Respondent's challenge is solely addressed—Petitioner's standing to challenge the sufficiency of the Neyer eavesdrop order—Respondent evidently lacks confidence in its position, for in the concluding paragraph of Respondent's argument on the point (Br. in Opp. 29) Respondent admits that "Since the cause for the Steinman order extends back and includes facts leading to the Neyer order, his challenge necessarily calls for review of the entire investigation."

This candid concession by Respondent reflects what is in fact the central analytical consideration which must defeat Respondent's challenge on the issue of "standing".

It will be recalled that in the proceedings, in the Court of first instance below, to suppress the eavesdrop proofs, it was disclosed that in April 1962 an *ex parte* eavesdrop order for the office of Harry Neyer was obtained on affidavits by two Assistant District Attorneys who merely referred conclusorily to information as to improprieties in the issuing of licenses by the SLA, not stating any source for such alleged information; that the *ex parte* order by Justice Sarafite for the Neyer eavesdrop referred only to the aforesaid two affidavits; and that thereafter, in June 1962 an *ex parte* eavesdrop order for the office of Harry Steinman was obtained on similar conclusory affidavits by two Assistant District Attorneys, except that this time

there was a reference to the source of information, namely "a duly authorized eavesdropping device installed in the office of * * * Harry Neyer" (Pet. Cert. 5-8, 19-25).

It will be recalled also that both the Neyer and the Steinman eavesdrops were nevertheless deemed significant in connection with the motion to suppress, because the parties stipulated that without the Neyer and the Steinman eavesdrops this prosecution could not have been instituted or maintained (Pet. Cert. 20).

There are thus two ways in which the Neyer eavesdrop—even though no evidence therefrom was introduced at the trial—is or may be important for the purposes of this case, namely, (1) the Neyer eavesdrop is stipulatedly a part of the evidentiary leads indispensable for this prosecution, and (2) the Neyer eavesdrop formed the basis for the *ex parte* order allowing the Steinman eavesdrop.

Even if, *arguendo,* Petitioner's non-presence in Neyer's office during the eavesdropping deprives Petitioner of "standing" to object to the introduction of any Neyer eavesdrop evidence in the trial as such, that is not the issue here because no such Neyer eavesdrop evidence was introduced in this trial. The issues here are, as above intimated, (1) does Petitioner Berger have standing to seek dismissal of the indictment on the ground that leads were obtained from the Neyer eavesdrop, and (2) does Berger have standing to urge the invadility of the Steinman eavesdrop as having been based on the Neyer eavesdrop?

As to the first of the above two issues—standing to attack the Neyer eavesdrop as a source of evidentiary leads—we submit as follows: Since the People stipulated at the trial that, in effect, the Neyer and Steinman eavesdrops had operated *integratedly* to produce the indispensable leads and evidence for this prosecution, and since Berger's standing to challenge the Steinman eavesdrop is undisputed, it is difficult to understand how Berger can be denied stand-

ing to challenge the integrally connected Neyer eavesdrop even though he was not present in Neyer's office. To deny Berger such standing in these peculiar circumstances of an integrated series of eavesdrops would be contrary to the philosophy of *Jones* v. *United States*, 362 U. S. 257, "that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement" (at p. 264), and "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical" (at p. 266). Cf., also *Wong Sun* v. *United States*, 371 U. S. 471, where the Court required exclusion of several items of evidence each of which had been serially obtained as a product of respective serial antecedent seizures found to have been invalid.*

It is our initial contention, then—in response to Respondent's challenge of Berger's standing as to the Neyer eavesdrop—that insofar as the Neyer eavesdrop stipulatedly formed an integral part of the eavesdrop-obtained leads for this prosecution as such, it would be artificial in constitutional terms to deny Berger such standing for such purpose.

There are additional reasons why it would be constitutionally wrongful to deny Berger's standing to attack the Neyer eavesdrop as an integral source of the admittedly basic and indispensable prosecutive leads in this case. This is a conspiracy prosecution. The eavesdrops were

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* We realize that in *Wong Sun* the Court applied the exclusionary rule to a backward-in-time series of invalid seizures, and that we are speaking here of a series moving forward in time, *viz.*, the earlier Neyer eavesdrop in relation to the later Steinman eavesdrop. However, the stipulatedly integrated character of the two eavesdrops in our case justifies our argument, we submit.

sought, and they are being justified by Respondent in this prosecution, as necessary to find proof of conspiracy. The investigative net which the police cast over the area and the personnel of the alleged conspiracy *via* the initial Neyer eavesdrop is claimed to have enmeshed almost at once the alleged conspirator Berger. The People claimed in the Courts below that the Neyer eavesdrop disclosed, *inter alia,* several telephone calls between Neyer and Berger relating to the obtaining of a liquor license under circumstances which the People portrayed as having a suspicious appearance (A59). A conspiracy is a partnership in crime. If conspirators are liable for each other's acts and declarations in furtherance of the conspiracy, why should they not have the right to invoke each other's "standing" in the matter of objection to improper search and seizure? This formulation which, we are suggesting, of the issue of "standing" in the setting of an investigation or prosecution against co-conspirators has apparently not yet received judicial consideration. The formulation seems to us reasonable in Fourth Amendment terms, the more so in the setting of this particular case, where, again, the antecedent eavesdrop (Neyer) was admittedly integral with the later eavesdrop (Steinman) as furnishing the indispensable leads and evidence for this prosecution.

The entire tenor and direction of the recent Federal cases on the issue of Fourth Amendment "standing" are generally favorable to our position rather than to that of Respondent. Respondent relies primarily on *Jones* v. *United States,* 362 U. S. 257. But one would not know from Respondent's description of that case that *Jones* brought about a historic liberalization of the rules as to Fourth Amendment "standing". *Jones* held that a defendant who was present as a mere guest in unlawfully searched premises had standing to object to a seizure of evidence used to convict him. *Jones* expressly departed from a long and numerous course of prior Federal decisions which had

imposed far stricter requirements of "possessory" standing. See also *Henzel* v. *United States,* 296 F. 2d 650 (C. A, 5 1961); *Burge* v. *United States,* 333 F. 2d 210 (C. A. 9, 1964). In the latter case a search was held unreasonable although the host of a house guest had consented to the search.

Thus far we have been discussing the question of "standing" in relation to Petitioner Berger's right to seek dismissal of the indictment by reason of unlawful evidentiary leads emanating integratedly from the Neyer and Steinman eavesdrops. We now take up the second of the above mentioned ways in which the issue of "standing" properly comes into this case, i.e., the issue of whether Berger has standing to attack the Neyer eavesdrop insofar as the latter formed the basis of the Steinman eavesdrop order. As to this latter question there can be no serious dispute that Berger obviously does have "standing".

Respondent simplistically stated (Br. in Opp. 27):

> "* * * Nor did he acquire standing to challenge this order because resulting evidence was subsequently used to support an order which he did have standing to challenge. Since material seized in violation of the constitutional rights of one person cannot be challenged when used in evidence against another, then certainly it is immune when employed as the basis for an order in the nature of a search warrant where the rules are somewhat relaxed."

The issue in terms of the problem of "standing", is not whether the Neyer eavesdrop "may be employed as the basis" for the Steinman eavesdrop order, as Respondent argues in the item just quoted. To be sure, there are reasons why Berger has standing to object even to such "employment" of the Neyer eavesdrop in obtaining the Steinman eavesdrop order, but passing that aspect for the moment, the point still remains that Berger indubitably

had the right (whether it is termed "standing" or anything else) to attack the *sufficiency* (as distinct from the employability as such) of the Neyer eavesdrop information as a basis for issuing the Steinman eavesdrop order. Berger unquestionably had this right to urge that the Neyer eavesdrop information, which Respondent says was the basis of their application for the Steinman eavesdrop order, was insufficient for that purpose simply as a matter of the tests of Fourth Amendment probable-cause sufficiency. If we are correct in this, and we cannot see how the matter can be viewed otherwise, then what emerges is that this whole dispute which Respondent has raised concerning Berger's "standing" in relation to the Neyer eavesdrop turns out to be academic. For, if Berger does have this undoubted right to "reach" the issues of the Neyer eavesdrop simply as a matter of his right to challenge the validity of the Steinman eavesdrop on probable-cause grounds, then as a practical reality the issues as to the Neyer eavesdrop are inevitably "in the case" so to say, and any larger questions as to Berger's "standing" in relation to the Neyer eavesdrop recede from importance if indeed they do not become eliminated altogether from the case.

And so it may well be that our own constitutionally broader discussion of the issue of Berger's standing as to the Neyer eavesdrop as presented in the preceding pages herein, is not, strictly speaking, essential for the ultimate resolution of the issue of Berger's standing. We have wanted the Court to have our broader presentation, *supra*, in the interests of a full discussion, but it does respectfully seem to us that the dispositive argument is the one last above advanced—that as a part of Berger's undoubted and acknowledged right to attack the probable-cause validity of the Steinman eavesdrop order, he must perforce be permitted to attack the probable-cause sufficiency of the conceded basis of the latter order, to wit, the Neyer eavesdrop information.

Precisely this last suggested analysis has been announced and followed in a comparable situation in New York State, involving a series of wiretap orders, a decision within the past few days by County Judge Albert A. Oppido, in *People* v. *Edward McDonough and Charles Klimkowski,* Co. Ct., Nassau Co., Ind. No. 21,515, Motion Calendar No. C-704 & C-649, decided November 2, 1966—See N. Y. Law Journal Nov. 9, 1966, p. 20, col. 8 and p. 21, cols. 1 and 2.

II. The Continuing Judicial Ferment Over The "Mere Evidence" Problem.

Supplementing our petition for certiorari (pp. 12-18) on the above topic, we respectfully call attention to a decision which appeared in the "F. 2d" advance sheet for October 3, 1966, *Hayden* v. *Warden, Maryland Penitentiary,* 363 F. 2d 647 (C. A. 4 1966—opinion by Judge Sobeloff).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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